A

Public Prosecutor v Bakri bin Ruka

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(SH)-170–04 OF 2019
ABDUL KARIM, RAVINTHRAN AND ABU BAKAR JAIS JJCA
12 OCTOBER 2023

C *Criminal Procedure — Appeal — Appeal against acquittal — Respondent charged with murder under s 302 of Penal Code — High Court accepted defence of provocation and respondent acquitted of murder charges — Respondent convicted for culpable homicide under s 304(a) of Penal Code and sentenced to imprisonment — Whether respondent proved defence of grave and sudden*
D *provocation on balance of probabilities — Penal Code ss 300, 302 & 304*

The respondent was charged at the High Court with the murder of his ex-wife ('Hasura') and her son ('Basri'). According to Hasura's other son ('Bambang') who was 14 years old at that time, on 10 January 2016 around 2pm the
E respondent returned to the plantation quarters where they resided with Bambang and Basri present. The respondent expressed his desire to remarry Hasura but Basri voiced his objections which led the respondent to leave the quarters. That night, Bambang and Hasura shared a bedroom whereas Basri slept in another bedroom. At 5am, Bambang was awakened by Hasura's
F screams. He saw the respondent stabbing his mother in the chest and stomach with a knife. After attacking Hasura, the respondent proceeded to the other bedroom where Basri was sleeping while Hasura staggered to the living room where she eventually collapsed and later died. Bambang decided to go out and seek help. He saw the respondent leaving his brother's room and exiting their
G quarters through the backdoor. Bambang noticed his brother lying in the bedroom and believed that he had died. A plantation worker, who heard cries for help, hurried to Bambang's quarters and discovered that Hasura and Basri had been stabbed. The police located the respondent who was hiding within the plantation and arrested him on the following day. The pathologist testified
H that the fatal wound that caused the death of both victims was a stab wound that punctured the heart. The learned judicial commissioner ('JC') was satisfied that the prosecution had established a prima facie case and called for the defence of the respondent on both charges of murder. In his defence, the respondent said that Hasura attacked him first and injured him on the shoulder
I as soon as he entered the room. Basri came in later and attacked him as well. The respondent said he fought back but denied stabbing them and when he left the room both of them were alive. The JC found that: (a) the defence of provocation was raised during the prosecution's case because it was put to the investigating officer that Hasura injured the respondent on the shoulder with a

knife; (b) premeditation and motive for the murder was ruled out as the relationship between Hasura and the respondent before the incident was good, Bambang was not harmed and the respondent went to the house of his ex-wife unarmed; and (c) the multiple stab wounds on the victims were 'indicative of a reaction to provocation, a lack of ability to exercise restraint in a fit of rage'. The JC accepted the defence of provocation and acquitted the respondent of the murder charges. Instead, the respondent was convicted of the offence of culpable homicide under s 304(a) of the Penal Code and sentenced to 20 years imprisonment for each charge. Hence, these appeals by the prosecution.

Held, allowing the appeals:

(1) The JC's finding that the defence of grave and sudden provocation was proven was not supported by evidence and was a bare assertion. The audio-visual advantage was not properly utilised and that the finding of the JC was clearly against the weight of the evidence (see para 28).

(2) In his entire sworn testimony, the respondent did not mention, either directly or indirectly, that he was overcame with rage to the extent of losing self-control. Since the respondent did not testify about provocation or losing self-control, it was plainly not open for the JC to conclude that he killed the victims in a fit of rage due to provocation. The JC erred in not considering the evidence of the crucial witness, Bambang when making the findings on the defence of grave and sudden provocation. Bambang's evidence contradicted the submission by the respondent that the victims were the aggressors and that their actions provoked the respondent. Furthermore, Bambang's testimony was consistent with the evidence of the pathologist. The respondent's submission that he was provoked by Hasura's knife attack on him was extremely unlikely. It was a bare assertion. It was significant that the respondent entered the house without alerting its occupants at a time when it could be presumed that they would have been fast asleep. Additionally, the multiple stab wounds on Hasura, including on her stomach and chest, were more likely indicative of an act of revenge or retaliation that was out of proportion to any provocation that was given (see paras 39–42).

(3) The defence of grave and sudden provocation was not put to the relevant witness. The sole eyewitness to that event was Bambang; therefore, it should have been put to him. In any event, the defence was not put to the investigating officer. The defence of grave and sudden provocation was not raised at any point during the investigation stage or during the prosecution's case or the case for the defence. It was suddenly sprung during the final submissions of the respondent. The JC misdirected himself in finding that it was raised during the prosecution's case. The submission made at the end of the case seemed to be an afterthought

aimed at justifying the brutal attack on the victims who were asleep in their beds at that late hour (see paras 45–47).

(4) The JC misdirected himself in requiring evidence of motive after relying on Bambang's evidence to rule that a prima facie case had been proven. Similarly, evidence of premeditation was not necessary to prove a murder charge (see para 50).

(5) The failure to produce Hasura's bedsheet and mattress as she was stabbed while lying on it did not create gap in the narrative of the prosecution's case. Next, the JC misdirected himself by expressing the caution ie the evidence of the sole eyewitness, Bambang, must be viewed with caution as he was only 14 years old at the material time. Bambang was already 18 years old when he testified under oath. Therefore, he was not a child of tender years. Despite very extensive cross-examination, Bambang gave consistent and firm answers regarding what he saw on the morning in question. It was unlikely that any 14-year-old boy would forget the event. Expressing caution in respect of Bambang's evidence at the end of the case solely on the ground of his age was unjustified (see paras 51–53).

(6) The decision of the High Court to acquit the respondent of the charges of murdering Hasura and Basri could not be upheld. The conviction under s 304(a) of the Penal Code was substituted with a conviction under s 302 in both cases. The 20-year imprisonment sentenced imposed by the High Court for the convictions was set aside and death sentence was imposed for each of the two charges of murder (see para 57).

[Bahasa Malaysia summary

Responden didakwa di Mahkamah Tinggi atas pembunuhan bekas isterinya ('Hasura') dan anaknya ('Basri'). Menurut seorang lagi anak lelaki Hasura yang lain ('Bambang') yang ketika itu berusia 14 tahun, pada 10 Januari 2016 kira-kira jam 2 petang responden pulang ke kuarters ladang tempat mereka tinggal dengan kehadiran Bambang dan Basri. Responden menyatakan hasrat untuk berkahwin semula dengan Hasura tetapi Basri menyuarakan bantahannya yang menyebabkan responden meninggalkan kuarters. Pada malam itu, Bambang dan Hasura berkongsi bilik tidur manakala Basri tidur di bilik tidur lain. Pada pukul 5 pagi, Bambang dikejutkan oleh jeritan Hasura. Dia melihat responden menikam ibunya di dada dan perut menggunakan pisau. Selepas menyerang Hasura, responden terus ke bilik tidur lain di mana Basri sedang tidur manakala Hasura terhuyung-hayang ke ruang tamu di mana dia akhirnya rebah dan kemudian meninggal dunia. Bambang memutuskan untuk keluar mencari pertolongan. Dia melihat responden keluar dari bilik abangnya dan keluar dari kuarters mereka melalui pintu belakang. Bambang menyedari adiknya terbaring di dalam bilik tidur dan percaya bahawa dia telah meninggal dunia. Seorang pekerja ladang, yang mendengar jeritan meminta tolong, bergegas ke kuarters Bambang dan mendapati Hasura dan Basri telah

ditikam. Polis mengesan responden yang bersembunyi di dalam ladang dan menahannya pada hari berikutnya. Pakar patologi memberi keterangan bahawa luka fatal yang menyebabkan kematian kedua-dua mangsa adalah luka tikaman yang menusuk jantung. Pesuruhjaya kehakiman yang bijaksana ('PK') berpuas hati bahawa pihak pendakwaan telah membuktikan kes prima facie dan memanggil pembelaan responden atas kedua-dua pertuduhan membunuh. Dalam pembelaannya, responden berkata Hasura menyerangnya terlebih dahulu dan mencederakan bahunya sebaik masuk ke dalam bilik. Basri masuk kemudian dan menyerangnya juga. Responden berkata dia melawan tetapi menafikan menikam mereka dan apabila keluar dari bilik kedua-dua mereka masih hidup. PK mendapati bahawa: (a) pembelaan bangkitan-marah dibangkitkan semasa kes pendakwaan kerana telah dikemukakan kepada pegawai penyiasat bahawa Hasura mencederakan responden di bahu dengan pisau; (b) perancangan dan motif pembunuhan ditolak kerana hubungan antara Hasura dan responden sebelum kejadian adalah baik, Bambang tidak diapa-apakan dan responden pergi ke rumah bekas isterinya tanpa bersenjata; dan (c) beberapa kesan tikaman pada mangsa adalah 'menunjukkan tindak balas terhadap bangkitan-marah, kekurangan keupayaan untuk menahan diri dalam keadaan marah'. PK menerima pembelaan bangkitan-marah dan membebaskan responden daripada tuduhan membunuh. Sebaliknya, responden disabitkan dengan kesalahan membunuh bersalah di bawah s 304(a) Kanun Keseksaan dan dijatuhi hukuman penjara 20 tahun bagi setiap pertuduhan. Oleh itu, rayuan ini oleh pihak pendakwaan.

Diputuskan, membenarkan rayuan-rayuan:

(1) Penemuan PK bahawa pembelaan bangkitan-marah yang besar dan mengejut telah dibuktikan tidak disokong oleh keterangan dan merupakan dakwaan kosong. Kelebihan audio-visual tidak digunakan dengan betul dan penemuan PK jelas bertentangan dengan berat keterangan (lihat perenggan 28).

(2) Dalam keseluruhan keterangan bersumpahnya, responden tidak menyebut, sama ada secara langsung atau tidak, bahawa dia telah diatasi dengan kemarahan sehingga hilang kawalan diri. Memandangkan responden tidak memberi keterangan mengenai bangkitan-marah atau hilang kawalan diri, adalah jelas tidak terbuka bagi PK untuk membuat kesimpulan bahawa dia membunuh mangsa dalam keadaan marah kerana bangkitan-marah. PK terkhilaf kerana tidak mengambil kira keterangan saksi penting, Bambang ketika membuat penemuan pembelaan terhadap bangkitan-marah yang besar dan mengejut. Keterangan Bambang bercanggah dengan hujahan responden bahawa mangsa adalah penyerang dan tindakan mereka menimbulkan bangkitan-marah terhadap responden. Tambahan pula, keterangan Bambang adalah konsisten dengan keterangan pakar patologi. Hujahan responden bahawa dia dibangkitkan kemarahan oleh serangan pisau

Hasura terhadapnya adalah sangat mustahil. Ia adalah satu dakwaan kosong. Adalah penting bahawa responden memasuki rumah tanpa memaklumkan penghuninya pada masa yang boleh dianggap bahawa mereka akan tidur nyenyak. Selain itu, beberapa luka tikaman pada Hasura, termasuk di perut dan dadanya, lebih berkemungkinan menunjukkan tindakan membalas dendam atau pembalasan yang tidak sepadan dengan sebarang bangkitan-marah yang diberikan (lihat perenggan 39–42).

(3) Pembelaan bangkitan-marah yang besar dan mengejut tidak dikemukakan kepada saksi yang berkenaan. Satu-satunya saksi kejadian itu ialah Bambang; oleh itu, ia sepatutnya dikemukakan kepadanya. Walau apa pun, pembelaan tidak dikemukakan kepada pegawai penyiasat. Pembelaan bangkitan-marah besar dan mengejut tidak dibangkitkan pada bila-bila masa semasa peringkat siasatan atau semasa kes pendakwaan atau kes untuk pembelaan. Ia tiba-tiba muncul semasa hujahan akhir responden. PK tersalah arah apabila mendapati ia dibangkitkan semasa kes pendakwaan. Penghujahan yang dibuat pada akhir kes itu seolah-olah merupakan satu pemikiran terkemudian yang bertujuan untuk mewajarkan serangan kejam terhadap mangsa yang sedang tidur di atas katil mereka pada larut malam (lihat perenggan 45–47).

(4) PK tersalah arah dalam memerlukan bukti motif selepas bergantung kepada keterangan Bambang untuk memutuskan bahawa kes prima facie telah dibuktikan. Begitu juga, bukti perancangan tidak diperlukan untuk membuktikan tuduhan pembunuhan (lihat perenggan 50).

(5) Kegagalan mengemukakan cadar dan tilam Hasura ketika dia ditikam semasa berbaring di atasnya tidak mewujudkan kelompangan dalam naratif kes pendakwaan. Seterusnya, PK tersalah arah dengan menyatakan amaran iaitu keterangan saksi tunggal, Bambang, mesti dilihat dengan amaran kerana dia baru berusia 14 tahun pada masa itu. Bambang sudah berusia 18 tahun ketika memberi keterangan secara bersumpah. Oleh itu, dia bukan kanak-kanak yang masih muda. Walaupun dengan pemeriksaan balas yang sangat ekstensif, Bambang memberikan jawapan yang konsisten dan tegas mengenai apa yang dilihatnya pada pagi berkenaan. Tidak mungkin mana-mana budak lelaki berusia 14 tahun akan melupakan peristiwa itu. Menyatakan amaran berkenaan dengan keterangan Bambang pada akhir kes semata-mata atas alasan umurnya adalah tidak wajar (lihat perenggan 51–53).

(6) Keputusan Mahkamah Tinggi membebaskan responden daripada pertuduhan membunuh Hasura dan Basri tidak dapat dikekalkan. Sabitan di bawah s 304(a) Kanun Keseksaan digantikan dengan sabitan di bawah s 302 dalam kedua-dua kes. Penjara 20 tahun yang dijatuhkan

oleh Mahkamah Tinggi bagi sabitan tersebut telah diketepikan dan hukuman mati dikenakan bagi setiap dua pertuduhan membunuh (lihat perenggan 57).]

Cases referred to

Abdul Samid bin Edward v PP [2015] 4 MLJ 58; [2015] 4 CLJ 149, CA (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ 143, SC (refd)
Molu v State of Haryana AIR 1976 SC 2499, SC (refd)
Pathmanabhan a/l Nalliannen v PP and other appeals [2017] 3 MLJ 141; [2017] 4 CLJ 137, FC (refd)
Virsa Singh v State of Punjab AIR 1958 SC 465, HC (refd)

Legislation referred to

Evidence Act 1950 s 8
Penal Code ss 300, 300(a), (d), 302, 304, 304(a)

Appeal from: Criminal Trial Nos SDK-45B–3/12 of 2016 and SDK-45B–4/12 of 2016 (High Court, Sandakan)

Muhammad Azmi Mashud (Attorney General's Chambers) for the appellant.
Farazwin bt Haxdy (Farazwin Haxdy & Assoc) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] The appellant in this case is the public prosecutor. The respondent is Bakri bin Ruka. He was charged with the murder of his ex-wife and her 24-year-old son, both of whom were undocumented Indonesians residing in a plantation quarters (Rumah Kongsi) in the District of Kinabatangan in Sandakan, Sabah. The charges were registered in two separate cases. As he was accused of committing the offences at about the same time, a joint trial was ordered by the High Court. At the end of the trial, the learned judicial commissioner called for the defence of the respondent on both charges of murder. The respondent did not deny causing the deaths of the victims in his sworn testimony. However, he claimed that he was provoked by his ex-wife.

[2] The learned judicial commissioner accepted the defence of provocation, which is a defence under Exception 1 of s 300 of the Penal Code. He convicted the respondent of the offence of committing culpable homicide under s 304(a) of the Penal Code. The sentence imposed for each of the two charges was 20 years imprisonment, which was ordered to run concurrently. The public

prosecutor has appealed against the decision of the High Court to acquit the respondent of the charges of murder. The learned judicial commissioner only provided brief broad grounds in the notes of proceedings when he delivered his decision. As the learned judicial commissioner had retired from service, we proceeded with the appeal without the full grounds of decision.

[3] The charges against the respondent read as follows:

Case SDK-45B-3/12 of 2016

> Bahawa kamu, pada 11hb Januari 2016, jam lebih kurang 5.20 pagi, bertempat di alamat LQ65, Block E, Rumah Kongsi Pekerja, Ladang Permodalan 1, IOI, Kinabatangan, di dalam daerah Kota Kinabatangan, di dalam Negeri Sabah, dengan niat telah membunuh HASURA bt SIMA (TIADA KETERANGAN DIRI) dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

Case SDK-45B-4/12 of 2016

> Bahawa kamu, pada 11hb Januari 2016, jam lebih kurang 5.20 pagi, bertempat di alamat LQ65, Block E, Rumah Kongsi Pekerja, Ladang Permodalan 1, IOI, Kinabatangan, di dalam daerah Kota Kinabatangan, di dalam Negeri Sabah, dengan niat telah membunuh BASRI bin JAMALUDDIN (TIADA KETERANGAN DIRI) dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

CASE FOR THE PROSECUTION

[4] The prosecution called 14 witnesses to prove its case. The star witness who linked the death of the victims to the respondent was Bambang Hermanta bin Jamaludin (Bambang). He was 14 years old at the time in question. When he gave sworn evidence in court, he was already 18 years old. He and his mother, Hasura bt Sima, had come from Indonesia to work in the plantation sector in the year 2010. Hasura's name wasamended from Azura bt Shima in the original charge by the prosecution before the start of the trial. They lived in the Permodal 1 IOI plantation workers' quarters. Sometime later in 2014, Hasura married the respondent. They later divorced due to constant quarrels. In 2015, Bambang's older brother (Basri) came to live with them at the plantation quarters. He assisted Basri in getting a job at the plantation. The respondent left the plantation quarters following his divorce.

[5] Bambang told the court that tragedy followed in the wake of the respondent's return to their quarters on 10 January 2016. The respondent arrived around 2 pm on that day, with Bambang and Basri present. During this visit, the respondent expressed his desire to remarry their mother, Hasura. Basri voiced his objections, which led the respondent to leave the quarters.

[6] That night, Bambang and his mother shared a bedroom, whereas his brother, Basri slept in another bedroom. In the early hours of the following day, at 5am, Bambang was awakened by his mother's screams. He saw the respondent stabbing his mother in the chest and stomach with a knife. Bambang had a clear view of the respondent and the knife he used, thanks to the bedroom light being switched on. After attacking Hasura, the respondent proceeded to the other bedroom where Basri was sleeping. Hasura, meanwhile, managed to get up from the bed and staggered to the living room, where she eventually collapsed and later died.

[7] Bambang heard the respondent and Basri quarrelling in the other bedroom after which silence fell. Bambang decided to go out and seek help. As he left the bedroom, he saw the respondent leaving his brother's room and exiting their quarters through the backdoor. He noticed his brother lying in the bedroom and believed that he had died.

[8] A plantation worker by the name of Albario Valentine heard cries for help coming from the workers' quarters around the same time. He hurried to Bambang's quarters and discovered that Hasura and Basri had been stabbed. He immediately called the police. With assistance from some workers, the police located the respondent, who was in hiding within the plantation, and arrested him on the following day. The respondent gave his age as 45 years old to the arresting officer.

[9] The prosecution relied heavily on the sworn eyewitness testimony of Bambang. He successfully identified the respondent in the police identification parade, which was expected as the respondent was once his step-father and not a stranger. The prosecution also relied on circumstantial evidence. The respondent ran away to hide in the plantation shortly after the incident. This constituted evidence of conduct under s 8 of the Evidence Act 1950. But the police did not manage to procure direct forensic evidence linking the respondent to the deaths of Hasura and Basri. The bloodstain recovered from the living room (E1), which belonged to an unidentified female, had been contaminated and no analysis was conducted on stains from any weapon. Thus, Bambang's eyewitness testimony formed the cornerstone of the prosecution's case.

[10] Regarding the injuries sustained by the victims, the pathologist testified that both victims suffered multiple stab wounds. However, the fatal wound that caused the death of both victims was a stab wound that punctured the heart and led to their deaths.

A DECISION OF HIGH COURT AT END OF PROSECUTION'S CASE

[11] As we said earlier, the learned judicial commissioner did not write his full grounds of decision. We shall reproduce below a summary of the main points of fact and law argued before him. The learned deputy public prosecutor ('DPP') submitted that Bambang gave credible evidence that it was the respondent who caused the death of the victims. Bambang testified that he witnessed the respondent stabbing his mother in the stomach and chest with a knife. He did not see the respondent stabbing his brother, Basri, but he saw him go to his room after stabbing his mother. He heard loud shouts and a short while later, he saw the respondent leaving the quarters. Bambang entered the room and found that his brother too had collapsed and believed that he had died. The pathologist's evidence corroborated Bambang's story that the victims were stabbed with a knife. Both suffered multiple stab wounds and the fatal wound was the deep puncture wound to the heart. The pathologist also told the court that Hasura had also been stabbed in the stomach like Bambang said. In addition, the DPP urged the court to consider the respondent's attempt to flee the scene and hide in the plantation under s 8 of the Evidence Act 1950.

[12] Counsel for the respondent argued that the prosecution failed to establish a prima facie case. He said that no forensic evidence linked the respondent to the scene of crime or the death of the victims. No weapon was found and the DNA of the respondent was not recovered from the scene for profile matching. On the contrary, he said that the DNA of an unknown female was developed from blood stains found in the living room and this caused a gap in the prosecution's case. He also urged the court not to consider the evidence of Bambang as he was only 14 years old at the time of the incident. He submitted that Bambang probably woke up after his mother was stabbed and therefore could not have witnessed the incident. Counsel for the respondent also questioned the integrity of the identification parade procedure as the respondent was the only suspect who was not given a number in the line-up. Therefore, Bambang identified him by touching his shoulder. We pause to observe that Bambang is not a stranger to the respondent and therefore the identification parade was unnecessary. Bambang obviously recognised the respondent who was once his step-father.

[13] The learned judicial commissioner was satisfied that the prosecution established a prima facie case and he called for the defence of the respondent on both charges of murder.

THE DEFENCE

[14] The respondent elected to give sworn evidence. He did not call any other witness. He told the court that he is from Indonesia. He came to Sabah

in the year 2014. He had been married to Hasura for about a year but was already divorced from her at the time of the incident. Basri and Bambang, are his former stepchildren. After marrying Hasura, he lived with her and Bambang in the same quarters. Basri joined them only a month before the incident. Following his divorce, the respondent moved to a nearby quarters approximately 300 metres away. He said his marriage broke down because of the interference of Hasura's brother, but he left the quarters onamicable terms with Basri.

[15] On 11 January 2016, he came to Hasura's quarters at about 5am. He did so because he intended to reconcile with Hasura. She had on a previous occasion said to him 'Bakri datang ke rumah saya'. Another reason for his visit was that he believed Hasura had cast a spell on him (*guna guna*), causing him mental distress. He hoped she could remedy the situation. Since, the quarters was not locked, he entered it and went into her bedroom. However, before he could say anything, Hasura attacked him with a knife. Shortly after, Basri entered the room and also attacked him. Hasura wounded him in the shoulder with the knife. The respondent fought back. He described it as a 'knife fight'. He claimed that when he left the quarters, both Hasura and Basri were alive.

[16] Although, the respondent said that he was involved in a knife fight with Hasura and Basri, during cross-examination, he denied stabbing them. He said as follows:

> Q: Adakah kamu setuju atau tidak pada waktu itu kamu telah menikam Hasura di bilik tidurnya?
>
> A: Tidak.
>
> Q: Adakah kamu setuju atau tidak kamu juga telah menikam Basri di bilik tidurnya?
>
> A: Tidak.

[17] The respondent said he had no intention to harm either Hasura or Basri and that he did not bring any knife with him to the quarters. During cross-examination, he said that he suffered from impotence due to a spell cast by Hasura, and he believed that only she could cure him.

[18] However, the respondent denied being angry with her. He wanted to remarry her and also wanted her to lift the said spell. He also agreed that the previous day he went to Hasura's quarters to discuss the possibility of remarriage but faced objections from Basri. He denied that he told the police that the wound on his shoulder resulted from a later incident in which he attempted to steal a motorcycle and the owner of it stabbed him.

A DECISION OF HIGH COURT AT END OF CASE FOR THE DEFENCE

[19] To recapitulate, the respondent did not deny going to Hasura's quarters at 5am on the day in question. He did not deny being involved in a 'knife fight' with Hasura and Basri. But he said that Hasura attacked him first and injured him on the shoulder as soon as he entered the room. Basri came in later and attacked him as well. He said he fought back and when he left the room both of them were alive. However, during cross-examination, he denied stabbing them.

[20] It must be noted that in his entire testimony, the respondent never said that he was provoked or that he was provoked to the extent that he lost control of himself. His counsel raised only one defence at the end of the case; that the fact that Hasura attacked him with a knife caused sudden and grave provocation on his part and he lost control of himself. Counsel for the respondent also submitted that the respondent had no intention of killing the victims. He came to the house unarmed. He wanted to reconcile with his ex-wife but was instead rebuffed with a knife attack that injured his shoulder. Therefore, there was no premeditation on his part in respect of the deaths of Hasura and Basri.

[21] The learned DPP submitted that the defence of grave and sudden provocation was an afterthought raised only in the submissions. The respondent did not say in his testimony that he was provoked. The defence of grave and sudden provocation was not put to the crucial prosecution witness, Bambang or the investigating officer. When the respondent was arrested by the police, there was no mention of this defence either. However, counsel for the respondent submitted that it was put to the investigating officer that the wound on the respondent's shoulder was caused by Hasura.

[22] In his broad grounds of decision that was delivered orally, the learned judicial commissioner made the following findings. His Lordship made the finding that the multiple stab wounds on the victims were inflicted by the respondent and that he caused their deaths. However, he found that the respondent reacted to provocation. His reasons, in summary, are as follows.

[23] The respondent went to Hasura's house to reconcile with her. However, Hasura attacked him and he was overcome with rage. The learned judicial commissioner said that the defence of provocation was raised during the prosecution's case because it was put to the investigating officer that Hasura injured the respondent on the shoulder with a knife. He also found that the relationship between Hasura and the respondent before the incident was good and that Bambang was not harmed. Furthermore, the respondent went to the house of his ex-wife unarmed. For that reason, he ruled out premeditation and

motive for the killing of Hasura and Basri. Finally, with respect to the multiple stab wounds on the victims, he said they were 'indicative of a reaction to provocation, a lack of ability to exercise restraint in a fit of rage'.

[24] Having found that the defence of provocation succeeded, the learned judicial commissioner acquitted the respondent of the murder charges. Instead, he convicted the respondent under s 304(a) of the Penal Code.

ISSUES IN THE APPEAL

[25] The respondent did not appeal against his conviction for the offence of culpable homicide notamounting to murder in respect of both charges. He did not appeal against the sentence either. Therefore, the finding of fact of the High Court that the respondent killed the victims is not a live issue in this appeal. The only appeal is by the prosecution against the decision of the High Court to acquit the respondent of the murder charges and convict him under s 304(a) after finding that the defence of grave and sudden provocation succeeded.

[26] In the premises, the sole issue in this appeal is whether the High Court erred in finding that the respondent had proved the defence of grave and sudden provocation on a balance of probabilities.

LAW ON GRAVE AND SUDDEN PROVOCATION

[27] We shall first direct ourselves on the law in respect of the defence of grave and sudden provocation. Grave and sudden provocation is a special exception defence under s 300 of the Penal Code. The first exception to s 300 reads as follows:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

[28] If the grave and sudden provocation is proved, the act in question can onlyamount to the lesser offence of culpable homicide notamounting to murder under the first or second limb of s 304 as found by the learned judicial commissioner. The learned DPP argued that the learned judicial commissioner's finding that the defence of grave and sudden provocation was proven is not supported by the evidence in this case and was a bare assertion. We find much merit in this submission. We are ever mindful that an appellate court should not lightly interfere with the findings of fact of the trial court that had audio visual advantage. However, we are of the unanimous view that such advantage was not properly utilised in the instant case and that the finding of

A the learned judicial commissioner was clearly against the weight of the evidence.

[29] In the oft-cited case of *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ 143, the Supreme Court speaking through George Seah SCJ laid down the 'reasonable man' test for the defence of grave and sudden provocation:

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self- control (see *Nanavati v State of Maharashtra* [1962] AIR SC 602).

[30] In the later case of *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281, the Federal Court distilled the applicable principles for this defence as follows:

> [17] Thus, in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide notamounting to murder, it is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that question the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation.

NO EVIDENCE OF GRAVE AND SUDDEN PROVOCATION

[31] Having regard to the words of the first exception and the eminent authorities we cited, it is not enough for an accused person to simply say that he was driven to kill another merely because he was provoked. The provocation must be grave and sudden. It should cause him to lose self-control. The test is also partly objective. To put it pithily, the accused must show that another reasonable person from the same background and in the same situation would have reacted in the same way.

[32] In the absence of the full grounds of decision of the High Court, we find it necessary to repeat some background facts and delve into the sworn testimony of the respondent in some detail.

[33] The respondent and his victims are of Indonesian Bugis origin. He had been living in Sabah since 2014. Following his divorce from Hasura, he lived in another quarters some 300 metres away. He had been cold-shouldered the day earlier by Basri when he expressed his desire to remarry his mother. Nonetheless, he chose to visit their house at 5am the following morning when they would presumably be sleeping. His stated aim was to reconcile with his

ex-wife. We pause to comment that the learned judicial commissioner never considered whether the timing of his visit to his ex-wife lent any credibility to his avowed purpose of reconciliation.

[34] The respondent said he opened the door because it was not locked. He did not say that he knocked on the door or called out to alert the occupants of his presence. He straightaway entered the bedroom of Hasura. He claimed that he was shocked that Hasura attacked him with a knife which she took from the house. He was injured on his shoulder. His account of what followed his entry into her bedroom is as follows:

> Tapi kenapa dia tiba-tiba serang saya, sedangkan saya datang ke rumah dia saya mahu baik kerana dia yang menghubung saya. Jadi di situlah mahu baik tetapi kenapa dia tiba-tiba serang saya. Disitilah saya terkejut dan saya sedar terjadi pergaduhan kerana dia serang saya.
>
> Selepas itu datang pula si Basri menyerang juga sama saya, akhirnya saya pun bergaduh sama si Basri. Selepas itu terjadinya penikaman, pergaduhan pakai pisau tetapi semasa saya tinggalkan kedua-duanya masih hidup. Selepas itu ada si Bambang dia teriak minta tolong sama orang. Dia berteriak, saya sudah jalan. Saya punya tujuan tidak tentu arah kerana saya dalam sakit oleh kerana kena guna-guna oleh bekas isteri.

[35] In the respondent's entire examination-in-chief, this is the only evidence he gave in respect of the alleged attack unleashed on him by his ex-wife and stepson. It is notable that nowhere in the above account, did the respondent say that he was either provoked by the victims or that he was provoked to the extent that he lost self-control. His only complaint was that even before he came to the house he suffered distress because his ex-wife had cast a spell on him.

[36] We shall now turn to the evidence the respondent gave during cross-examination. Once again, he complained that Hasura had cursed him, leading to his distress and impotence. He said as follows:

> Q: Adakah kamu bersetuju kamu percaya bahawa kamu percaya kamu mengalami penyakit lemah tenaga batin adalah disebabkan guna-guna yg dibuat oleh Hasura?
>
> A: Setuju.
>
> Q: Adakah kamu bersetuju kamu percaya bahawa penyakit lemah batin kamu in hanya boleh diubati oleh Hasura?
>
> A: Setuju.

[37] However, he never said anything about being provoked to the extent of losing self-control by the alleged attack on him by Hasura or Basri.

A **[38]** During re-examination, the respondent did not mention anything about experiencing loss of self-control due to provocation. Instead, he provided only confirmatory and clarification answers to the denials he made during cross-examination. He even denied stabbing Hasura and Basri.

B **[39]** Thus, in his entire sworn testimony, the respondent did not mention, either directly or indirectly, that he was overcome with rage to the extent of losing self-control. Throughout his testimony, he stated that he was shocked when Hasura attacked him, leading to a knife fight. Even if the respondent had claimed he was provoked by Hasura's response when he entered her bedroom, C it would still not be sufficient to invoke the defence of grave and sudden provocation. To successfully avail this defence, the respondent has to establish that he lost the power of self-control, which he did not do. The defence of grave and sudden provocation was only raised by his counsel in the final submissions. Since the respondent did not testify about provocation or losing self-control, it D was plainly not open for the learned judicial commissioner to conclude that he killed the victims in a fit of rage due to provocation.

[40] We are also of the opinion that the learned judicial commissioner erred E in not considering the evidence of the crucial witness, Bambang when making his findings on the defence of grave and sudden provocation. Bambang's sworn testimony was the sole evidence that linked the respondent to the death of the victims. The learned judicial commissioner called for the defence of the respondent, indicating that he had accepted Bambang as a credible witness. F Bambang told the court that Hasura was stabbed several times while lying in bed, and her screams woke him.

[41] Bambang's evidence contradicts the submission by respondent's counsel that the victims were the aggressors and that their actions provoked the G respondent. Furthermore, Bambang's testimony is consistent with the evidence of the pathologist. He told the court that both victims suffered multiple stab wounds, including many defensive wounds. In the premises, the submission of counsel for the respondent that the respondent was provoked by Hasura's knife attack on him is extremely unlikely. It was a bare assertion by the respondent H that Hasura attacked him with a knife. It is significant that the respondent entered the house without alerting its occupants at a time when it can be presumed that they would have been fast asleep.

[42] We would add that, even if it can be assumed that Hasura had defended I herself with a knife upon discovering the intrusion of the respondent into her bedroom, the multiple stabs wounds on her, including on her stomach and her chest, are more likely indicative of an act of revenge or retaliation that is out of proportion to any provocation that was given. There was nothing in the evidence of the respondent or the submissions of his counsel that any other

person with the same background as the respondent would have reacted the same way. These facts were not considered by the learned judicial commissioner.

WHETHER DEFENCE RAISED AT EARLY STAGE?

[43] The learned judicial commissioner said the defence of grave and sudden provocation was put to the investigating officer. The relevant passage of the broad grounds is as follows:

> It was put to PW13 that the injury on the accused's shoulder was inflicted by Hasura. This is at the very least in my mind put up the defence's case of provocation. Although the IO testified that the wound on Accused's shoulder was caused by Udang's husband as informed to him by Udang, neither Udang nor her husband was called as a witness and whatever he said remained hearsay.

[44] The investigating officer told the court that he was informed that the respondent attempted to hijack a motorcycle while on the run. Udang and her husband were riding it at that time. Udang's husband managed to thwart the hijack attempt by slashing the respondent on the shoulder.

[45] We are of the opinion that the defence of grave and sudden provocation was not put to the relevant witness. The investigating officer was not a witness to the attack in which the Hasura and Basri were killed. The sole eyewitness to that event was Bambang; therefore, it should have been put to him. In any event, we find that the defence was not put to the investigating officer. Counsel for the respondent only questioned the investigating officer about the injury on his client's shoulder, attributing it to Hasura. The cross-examination of the investigating officer by counsel for the respondent was as follows:

> Q: Saya katakan kepada kamu kecederaan pada bahunya adalah disebabkan oleh mangsa Hasura, setuju?
>
> A: Saya tidak setuju.

[46] There was no mention of provocation. Thus, it is clear that the defence of grave and sudden provocation was not raised at any point during the investigation stage or during the prosecution's case or the case for the defence. It was suddenly sprung during the final submissions of the respondent's counsel. For that reason, we find that the learned judicial commissioner misdirected himself in finding that it was raised during the prosecution's case.

[47] We hasten to add that early non-disclosure of a defence cannot be the basis to infer guilt. It is still the duty of the prosecution to prove its case beyond reasonable doubt (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209). However, the failure to put a defence early may deprive it of

credibility. In this case, as we pointed out, the respondent himself did not raise the defence in his sworn testimony. Therefore, the submission made by his counsel at the end of the case seems to be an afterthought aimed at justifying the brutal attack on the victims who were asleep in their beds at that late hour.

PREMEDITATION AND MOTIVE

[48] The learned judicial commissioner also cited the absence of premeditation and motive as a reason to acquit the respondent of the murder charges. We agree with the learned DPP that the learned judicial commissioner misdirected himself in taking this approach. It is trite law that motive is not an essential ingredient of a murder charge although in cases where the prosecution relies solely on circumstantial evidence, evidence of motive may greatly assist the prosecution. In the case of *Pathmanabhan a/l Nalliannen v Public Prosecutor and other appeals* [2017] 3 MLJ 141; [2017] 4 CLJ 137, the Federal Court cited with approval the following passages from two authorities. In *Molu v State of Haryana* AIR 1976 SC 2499, the Indian Supreme Court said as follows:

> It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes, the motive is clear and can be proved and sometimes, however, the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of eye witnesses is creditworthy and is believed by the court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant.

[49] In *Abdul Samid bin Edward v Public Prosecutor* [2015] 4 MLJ 58; [2015] 4 CLJ 149, this court made the same observation:

> Although motive was an important element to look out for when relying on circumstantial evidence to convict an accused, it was not in our view, an absolute must, in the sense that, an absence of an established 'motive' would exculpate the accused from the charge proffered against him, notwithstanding all other evidence which points to the accused being guilty of the crime charged.

[50] As we said earlier, the prosecution had relied on the direct eyewitness testimony of Bambang to establish its case. Therefore, the learned judicial commissioner misdirected himself in requiring evidence of motive after relying on Bambang's evidence to rule that a prima facie case had been proven. Similarly, evidence of premeditation is not necessary to prove a murder charge. Learned DPP cited the case of *Virsa Singh v State of Punjab* AIR 1958 SC 465 to support this argument. In this case, the Indian Supreme Court said that a conviction for murder can be sustained even in the absence of premeditation. The relevant passage is as follows:

> Where a man stabs another in a vital part, he must be held to have intended to cause death, and if death ensues either directly from the wound or in consequence of the wound creating conditions which give occasion to the appearance of a fatal disease, the person inflicting the wound is guilty of murder. *Absence of premeditation* will not reduce the crime of murder to culpable homicide notamounting to murder ... (Emphasis added.)

OTHER ISSUES

[51] The learned judicial commissioner also made some comments on issues that are not relevant to the defence of grave and sudden provocation in his broad grounds. He said that the prosecution failed to produce Hasura's bedsheet and mattress as she was stabbed while lying on it. We find that the failure to produce the same did not create gap in the narrative of the prosecution's case. Bambang testified that Hasura was stabbed in the front part of her body as she lay on the bed but she managed to stagger to the living room. His evidence was accepted as the learned judicial commissioner called for the defence.

[52] Secondly, despite calling for the defence, the learned judicial commissioner commented that evidence of the sole eye witness, Bambang, must be viewed with caution as he was only 14 years old at the material time. With due respect, we are of the view that the learned judicial commissioner misdirected himself by expressing this caution. Bambang was already 18 years old when he testified under oath. Therefore, he was not a child of tender years. As he was giving evidence regarding matters that occurred four years earlier, lapses in memory, if any, or inconsistencies that is apparent during examination-in-chief should have been addressed during cross-examination. However, despite very extensive cross-examination by counsel for the respondent, Bambang gave consistent and firm answers regarding what he saw on the morning in question. We reproduced a portion of the cross-examination of Bambang below for better appreciation of his consistent evidence:

> Q: Saya katakan kepada kamu pada hari kejadian tersebut apabila kamu bangun kamu cuma melihat ibu kamu sudah cedera di dalam rumah tersebut. Setuju?
>
> A: Tidak.
>
> Q: Saya katakan kepada kamu sebenarnya kamu tidak melihat dengan mata kamu sendiri yang ibu kamu ditikam pada hari kejadian. Setuju?
>
> A: Saya melihat dengan mata kepala saya sendiri kalau yang membunuh ibu saya adalah Bakri.
>
> Q: Saya juga katakan kepada kamu yang kamu tidak melihat dengan mata kamu sendiri yang Basri ditikam oleh Bakri pada pagi kejadian itu. Setuju?
>
> A: Saya memang tidak melihat Basri ditikam oleh Bakri tetapi saya mendengar suara bergaduh di dalam bilik Basri.

A Q: Semalam kamu katakan kepada pihak Mahkamah yang kamu melihat ibu kamu ditikam di atas katil, setuju?

A: Setuju.

Q: Jadi setuju jika saya katakan jikalau ibu kamu ditikam di atas katil di mana kamu
B berada akan terdapat percikan darah di atas katil ataupun pada kamu kerana berdekatan, setuju?

A: Tidak.

Q: Saya katakan kepada kamu bahawa sebenarnya ibu kamu tidak ditikam di atas katil di bilik kamu itu, setuju?

C A: Tidak.

[53] Considering what Bambang witnessed was a painful and traumatic event, we would say that it is unlikely that any 14-year-old boy would forget it.
D The learned judicial commissioner accepted his testimony; otherwise, he would not have called for the defence. In the premises, expressing caution in respect of Bambang's evidence at the end of the case solely on the ground of his age was unjustified.

E CONCLUSION

[54] In the instant case, the prosecution tendered direct evidence that was accepted by the learned judicial commissioner about the stabbing of both victims by the respondent. The evidence of the pathologist was that both
F victims sustained multiple deep stab wounds on the front part of the body, including the heart, which would in the ordinary course result in death. In the premises, intention to cause death can be inferred under limb (a) of s 300, or at the very least, knowledge can be inferred on the part of the respondent that his act is likely to cause death under limb (d) of the same section.

G

[55] The only defence raised was that of grave and sudden provocation. As we said earlier, the conclusion of the learned judicial commissioner that the said defence was proved on a balance of probabilities was plainly wrong as there was
H neither direct evidence from the respondent nor circumstantial evidence to support it. On the contrary, there was credible testimony from Bambang that the respondent repeatedly stabbed his mother as she lay on the bed and subsequently proceeded to the next room to kill his brother.

I **[56]** We have also considered whether, based on the evidence of the prosecution and the respondent, other defences such as sudden fight or self-defence should have been pursued by counsel for the respondent in the High Court. We are of the view that there is no evidence to warrant such an

inquiry. The evidence presented is that the respondent had for some reason, without warning, entered the bedrooms of his ex-wife and her son at 5am and brutally stabbed them to death.

[57] For all the above reasons, the decision of the High Court to acquit the respondent of the charges of murdering Hasura and Basri cannot be upheld. The appeals of the prosecution are allowed. We shall accordingly substitute the conviction under s 304(a) with a conviction under s 302 of the Penal Code in both cases. The 20-year imprisonment sentence imposed by the High Court for the convictions under s 304(a) is set aside. In its place, we impose the death sentence for each of the two charges of murder in the said two cases.

Appeal allowed.

Reported by Ahmad Ismail